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CURRENT TOPICS.

The case of the Trustees of the Internal Improvement Fund of Florida v. Greenough, recently decided by the Supreme Court of the United States, involved the subject of the costs of the administration of a trust fund. The opinion recognizes the principle that a trust estate must bear the expenses of its administration, and also, as established, the doctrine, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts, saying that this has long been the rule in relation to proceedings for restoring property to the uses of a charity which has been unjustly diverted therefrom. Attorney-General v. Brewers Co., 1 P. Wms. 376; Attorney-General v. Kerr, 4 Beav. 297; Attorney-General v. Old South Society, 13 Allen, 474. The same rule is applied to creditor's suits, where a fund has been realized by the diligence of the plaintiff (Stanton v. Hatfield, 1 Keen, 358; Thompson v. Cooper, 2 Colly. 87; Tootal v. Spicer, 4 Simons, 510; Larkin v. Paxton, 2 Myl. & K. 320; Barber v. Wardle, 2 Myl. & K. 818; Sutton v. Doggett, 3 Beav. 9), and in bankruptcy proceedings. Worrall v. Harford, 8 Ves. 4; *Re* Williams, 2 Bank. Reg. 28; *Re* O'Hara, 8 Law Reg. (N. S.) 113. The court then proceeds to point out a distinction between allowances to trustees *eo nomine*, and to petitioning creditors which is vital and worthy of attention, as follows: "But there is one class of allowances made by the court [below] which we consider decidedly objectionable; we refer to those made for the personal services and private expenses of the complainant. In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is. But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. The reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps to only a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support."

A propos of the abuses which have grown up and caused so much complaint under this practice, the opinion says, incidentally: "In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subject to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers and counsel as have sometimes been made, and which have justly excited severe criticism. Still, a just respect for the eminent judges under whose direction many of these cases have been administered, would lead to the conclusion that allowances of this kind, if made with moderation and a jealous

regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice."

Mr. Justice Miller, however, dissented from the principle invoked in the following vigorous language: "While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely, the absorption of a property or a fund which comes into the control of a court, by making allowances for attorneys' fees and other expenses, pending the litigetion, payable out of the common fund, when it may be finally decided that the party who employed the attorney, or incurred the costs, never had any interest in the property or fund in litigation. This system of paying out of a man's property some one else engaged in the effort to wrest that property from him, can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than make my protest against the doctrine."

DEFRAUDED VENDORS OF CHATTELS.

Fraud upon the vendor of goods and chattels, such as enables him to invoke the remedies which are within his legal grasp, usually consists in misrepresentations concerning the pecuniary standing of the purchaser.[1] The ordinary criterion governing cases of deceit applies to such fraudulent statements. They must be false, and known to be such, material and effectual.[2] They must not be mere expressions of opinion or judgment.[3] They may consist of positive representations, as where the buyer procured the sale of the goods by means of bogus representations and guaranties,[4] false statements of prosperous financial condition and the like; or they may consist of mere concealment, as where the purchaser fails to disclose the pendency of a suit against him, which involves a greater amount than the value of all his property.[5] The distinction is important where the purchaser is insolvent, and knows himself to be in such condition. In that event, the earlier decisions, which are still followed in certain jurisdictions, held that he was not guilty of fraud by merely concealing his condition. It was essential in order to hold him guilty of fraud, that he should have resorted to trick or artifice to obtain the goods. Without fraudulent representations on his part, or the use of false pretenses, felonious or otherwise, the seller could not treat the sale as fraudulent and subject to rescission or such other remedies as the law affords to defrauded vendors.[6] But an overwhelming majority of the later decisions hold that it is sufficient to charge the buyer with fraud, that at the time of the purchase he has no intention of paying for the goods. Such at least is the result of the American authorities.[7] The British decisions favor the same view, though the subject has been but scantily considered in the cases.[8]

The prevailing American opinion, that a preconceived design not to pay for the goods is sufficient, is also adopted by the Federal courts.[9] It has been thought that it would be otherwise if the determination to avoid payment were conceived subsequently to the purchase.[10] The factor which the insolvency of the buyer makes in the transaction, is not that of an essential element. Subsequent insolvency may show the previous fraudulent intent, but it is by no means conclusive. The insolvency may be known to the buyer and may be concealed by him; he may have no reasonable expectation of being able to pay for the goods, and yet the fraudulent intent may be lacking. The insolvent may still act in good faith, believing that he will be enabled to retrieve his fortunes. It is not enough that he does not intend to meet his promise to pay upon a particular day, or that he does not expect to be able to pay all his indebtedness. The fraudulent purpose may

[1] Lucky v. Roberts, 25 Conn. 786.
[2] Gregory v. Schoenell, 55 Ind. 101.
[3] Morse v. Shaw, 124 Mass. 59.
[4] Mowrey v. Walsh, 8 Cow., and cases cited in note.
[5] Devoe v. Brandt, 53 N. Y. 462.
[6] See Story on Sales, 4th ed., sec. 176 and cases cited.
[7] See the cases cited later.
[8] *Ex parte* Whitaker. See *In re* Shackleton, L. R. 10 Ch. App. 446.
[9] Biggs v. Barry, 2 Curt. 262; Parker v. Byrnes, 1 Low, 539; Conyers v. Ennis, 2 Mason, 236.
[10] Dows v. Burke, 28 Barb. 157.

also be entertained by a person who is perfectly solvent, but has no idea of paying for the goods he buys. The only important effect of absolute misrepresentations or concealment of financial standing by the purchaser, is to render his fraudulent purpose easier of proof.

The views just sketched as preponderating in the United States, have been announced in Connecticut, [11] Delaware, [12] Kentucky, [13] Maine, [14] Maryland, [15] Massachusetts, [16] Missouri, [17] New Hampshire, [18] New York, [19] Vermont, [20] and Wisconsin. [21] In Stewart v. Emerson, [22] the prevalent position has received its fullest exposition. On the other hand, the contrary view has been maintained in Pennsylvania, where it has been ruled, in the cases of Smith v. Smith, [23] and Backentoss v. Speicher, [24] that the intention of the purchaser not to pay for the goods, and his concealment of his insolvency, do not of themselves constitute such fraud as will vitiate the sale; but that there must be artifice intended and fitted to deceive, practiced by the buyer upon the seller. [25]

In North Carolina it has been lately held that the vendor was entitled to reclaim the property, and that the facts warranted a finding that the purchase was made with fraudulent intent, under these circumstances. The purchaser carried on business in North Carolina. Knowing himself to be insolvent, he bought goods of the agent of a Baltimore house. When asked for references as to solvency, he gave names of New York firms only. Immediately on receipt of the goods he went into bankruptcy. [26]

In cases where the purchaser makes false and fraudulent representations as to his solvency and means of paying for the goods he buys, it has been laid down that he acquires no right either of property or of possession, and that the vendor would be justified in retaking the property. [27]

But as will be seen later, it is not universally agreed that the fraudulent purchaser gains no title whatever, and therefore replevin would seem to be the proper remedy for the recovery of the specific property, especially since recaption has become so largely obsolete. But if the goods can no longer be retaken or replevied, the vendor may either treat the acts of the fraudulent vendee as a conversion, and bring an action of trover for the value of the goods, or he may bring an action on the case for deceit, or he may even ratify the transaction and bring *assumpsit* for the proceeds of the articles sold by the defrauding purchaser. [28] The limitations upon these remedies will be considered later.

The same remedies would be available where the fraud concerns the subject matter of the sale, its character and condition or its price. But in such cases it is often difficult to determine when the purchaser is guilty of fraud such as renders the sale subject to rescission. Without misleading words or conduct by the buyer, the sale is binding, although the purchaser concealed the existence of a mine on the land sold, or any valuable element of a chattel of which the vendor was ignorant. [29] The same is true where the vendee had private information (which he was under no obligation to divulge), as news of peace, during the supposed existence of war, or of a great rise in the foreign market; and he should, concealing his knowledge, buy articles, the value of which would be greatly enhanced by such a fact, of a person ignorant thereof. [30]

11 Thompson v. Rose, 16 Conn. 71.

12 Mears v. Waples, 3 Houst. 581; affirmed, 4 Houst. 62.

13 Wood v. Yeatman, 15 B. Mon. 271.

14 Cross v. Peters, 1 Greenl. 378.

15 Powell v. Bradlee, 9 Gill. & J. 220.

16 Rowley v. Bigelow, 12 Pick. 307; Dow v. Sanborn, 3 Allen, 181; Wiggin v. Day, 9 Gray, 97; Kline v. Baker, 99 Mass. 253.

17 Bidault v. Wales, 20 Mo. 546; Fox v. Webster, 46 Mo. 181.

18 Stewart v. Emerson, 52 N. H. 301.

19 Andrew v. Dietrich, 14 Wend. 31; Ach v. Putnam, 1 Hill, 302; Cary v. Hotailing, 1 Hill, 311; Barnard v. Campbell, 65 Barb. 286; Fish v. Payne, 14 N. Y. 586; Henneguin v. Taylor, 24 N. Y. 139; Paddon v. Taylor, 44 N. Y. 581.

20 Redington v. Roberts, 25 Vt. 694; Hodgedon v. Hubbard, 18 Vt. 504.

21 Rice v. Cutter, 17 Wis. 362; Garbutt v. Bank of Prairie du Chien, 22 Wis. 384.

22 52 N. H. 301.

23 21 Pa. St. 367.

24 31 Pa. St. 324.

25 Compare, however, Rodman v. Thalheimer, 75 Pa. St. 232.

26 Wilson v. White, 50 N. C. 280.

27 Story on Sales (4th ed.), sec. 172 a, citing Hodgedon v. Hubbard, 18 Vt. 504; Johnson v. Peck, 1 Woodb. & Minot, 334; Mason v. Crosby, 1 Woodb. & Minot, 342.

28 Hawkins v. Appleby, 2 Sandf. (S. C.) 421.

29 Fox v. Mackreth, 2 Bro. C. C. 420; Pidcock v. Bishop, 3 B. & Cr. 605; Prescott v. Wright, 4 Gray, 461; Harris v. Tyler, 24 Pa. St. 347.

30 Turner v. Harvey, 1 Jacob, 178; Laidlaw v. Or-

So the sale is regarded as fraudulent when the purchaser buys at auction and deters others from bidding, by combinations designed to stifle competition, unless such association was rendered necessary by the magnitude of the sale, or has any other object than that of depressing the price of the property below the fair market value.[31] The sale is also treated as fraudulent if made in stolen goods or counterfeit money.[32] So, if the goods are paid for in worthless checks or factitious or forged paper.[33] In these cases there is not only a failure of consideration, but a fraudulent contrivance to procure the property; and the fact that such false pretenses may, under the statutes of various States, be regarded as a felony, does not place the transaction on the same footing as larceny, for the goods are obtained under color of a sale.[34]

Another mode in which a fraudulent sale may be effected is by the purchaser's false impersonation of another party, or where he represents himself to be the clerk or partner of a firm in good standing. If the goods are sold in that belief, the sale is subject to rescission for fraud; and the fraud is even of a more pronounced character if they are sold on the personal credit of the purchaser, irrespective of any name he may use, or business he may pretend to act for. In the latter case the transaction stands on the same footing as larceny, trespass or conversion by a bailee, and there is no sale to the defrauding person, and no semblance of a title gained by such fraudulent possessor of the goods.[35]

Where the sale is tainted with fraud in any of its countless forms, the vendor has the right of rescission and the privilege of ratification. He may affirm the contract by bringing *assumpsit* for the price of the goods; but he can not bring such action before the term of credit has expired, for in affirming the contract he is bound by its terms.[36]

Ratification may also be effected indirectly by delay in rescinding, or by accepting the benefits of the sale in any shape, or other acts of acquiescence in the fraud or indorsement thereof. But mere delay (as waiting a few days before the presentment of a check), will not operate as a ratification unless it clearly indicated an intention not to rescind.[37] Having once affirmed the sale, however, by bringing *assumpsit*, the vendor can not then change his mind, abandon his suit, demand the goods and proceed in trover, under the claim, that he has rescinded the sale for fraud.[38] He is not, however, precluded from setting up the fraud as against the plea of a discharge in bankruptcy made by the purchaser.[39] Nor does the proof of a claim and the receipt of a dividend in bankruptcy, upon notes given for the goods, prevent the maintenance of an action for the fraud perpetrated in procuring the sale.[40] While the defrauded vendor has the alternative of ratifying the contract of sale, his option may be exercised in favor of rescinding the sale. But he can not thus disaffirm the sale and yet retain any consideration received for the transfer, but must restore such consideration or make a tender of the same, so that if his offer is refused, he may be able to allege performance of all obligations on his part.[41] But if the article is absolutely valueless, it would be a nugatory act to return it.[42] Nor is it necessary to make reimbursements of moneys expended in furtherance of the fraud, as in paying the government tax on whisky which had been placed in a United States bonded warehouse, where such sums were advanced in order to procure the possession of the property, by a party acting in collusion with the

gan, 2 Wheat. 178; Fox v. Mackreth, 2 Bro. C. C. 420; Prescott v. Wright, 4 Gray, 461; Story on Sales (4th ed.), sec. 175.

31 Phippen v. Stickney, 3 Met. 387; Jenkins v. Frink, 30 Cal. 378; Smith v. Greenlee, 2 Dev. 126; Small v. Jones, 1 Watts & S. 128; Switzer v. Skiles, 3 Gilm. 529.

32 Titcomb v. Wood, 38 Me. 563; Green v. Humphrey, 50 Pa. St. 212; Lee v. Portwood, 41 Miss. 109.

33 Cochran v. Stewart, 21 Minn. 435; Hawse v. Crowe, Ryan & M. 414; White v. Garden, 10 C. B. 919; Bristol v. Wilsmore, 1 Barn. & Cress. 514.

34 Williams v. Given, 6 Gratt. 268.

35 Kingsford v. Merry, 1 H. & N. 503; Hallins v. Fowler, 7 Eng. & Gr. App. 757; Hardman v. Booth, 1 H. & C. 803; Moody v. Blake, 117 Mass. 23; Dean v. Yates, 22 Ohio St. 388; Barker v. Dinsmore, 72 Pa. St. 427; Cundy v. Lindsay, 3 App. Cas. 459.

36 Butler v. Hildreth, 5 Met. 49; Kellogg v. Turpie, 2 Brad. (Ill.) 55; Moriarty v. Stofferan, 89 Ill. 428; Stewart v. Emerson, 52 N. H. 301; Bicknell v. Buck, 58 Ind. 334.

37 Hodgson v. Barrett, 23 Ohio St. 63.

38 Bulkeley v. Morgan, 46 Conn. 693; compare Dalton v. Hamilton, 1 Hanney (N. B.), 422.

39 Stewart v. Emerson, 52 N. H. 301.

40 McBean v. Fox, 1 Brad. (Ill.) 177; compare, to similar effect, Maller v. Tasker, New York Notes of Cases, December 13, 1881; mentioned in 13 Reporter, 252.

41 Horrin v. Libbey, 36 Me. 357; Willoughby v. Moulton, 47 N. H. 205.

42 See Norton v. Young, 3 Greenl. 33, note.

defrauding purchaser.[43] But it has been laid down,[44] and the statement is presumably applicable to a defrauded vendor, that a party having an election to rescind an entire contract must rescind it wholly or in no part.[45] He can not avoid it to retain his property, and, at the same time, enforce it to recover damages.[46] The contract can not be rescinded as to one party, and be kept in force as to the other.[47]

The restoration, or an offer equivalent thereto, must, like the rescission, be made promptly. The notes of a third party must be surrendered before suing in tort the fraudulent vendee who has given them in payment.[48] But when the notes of the defrauding purchaser are given for the goods, the vendor may, upon discovering the fraud, bring trover or replevin without first surrendering the notes; but he must do so either before the trial,[49] or on the trial.[50]

The disaffirmance of the contract of sale may be made as late as during the trial, if the fraud is then for the first time discovered.[51] Indeed, the general principle is, that the defrauded vendor must rescind with due diligence, and within a reasonable time after the discovery of the fraud. He may keep the matter open so long as he has done nothing in the way of ratifying the transaction.[52] But he may lose his right to rescind by delay if, in consequence of such delay, the position of the wrong-doer is altered; and he will lose it absolutely if, during the interval between the delivery of the goods and the disaffirmance of the sale by the defrauded vendor, the goods have been sold to an innocent third party for a valuable consideration.[53]

The *bona fide* purchaser, in such a case, who pays actual value and is free from knowledge or notice of the fraud, stands in a better position than the original owner who has allowed himself to be deceived. Such a *bona fide* purchaser is protected in his right to the property for which he has paid in ignorance of the fraud perpetrated by his vendor. This protection is established by the authorities.[54] It has been declared by the courts of California,[55] Connecticut,[56] Delaware,[57] Georgia,[58] Kansas,[59] Kentucky,[60] Illinois,[61] Indiana,[62] Iowa,[63] Maine,[64] Maryland,[65] Massachusetts,[66] Minnesota,[67] Mississippi,[68] New Hampshire,[69] New York,[70] Ohio,[71] Pennsylvania,[72] Tennessee,[73] Virginia,[74] Wisconsin.[75] In England, the protection of the innocent purchaser from a fraudulent vendee is also established.[76]

The principle, or process, by which the defrauded vendor is divested of his title, and it becomes established in the *bona fide* purchaser from the fraudulent vendee, is not fully agreed.[77]

The American annotator of Benjamin on

[43] Suckenheimer v. Augerine, 81 N. Y. 394.
[44] Benj. on Sales (3d Am. ed.), sec. 452, note a.
[45] Miner v. Bradley, 22 Pick. 457; Voorhees v. Earl, 2 Hill (N. Y.), 292, 293.
[46] Junkins v. Simpson, 14 Me. 364; Weeks v. Robie, 42 N. H. 316.
[47] Coolidge v. Brigham, 1 Met. 550; Fullazer v. Reville, 3 Hun, 600.
[48] Norton v. Young, 3 Greenl. 33, note.
[49] Coghill v. Boring, 15 Cal. 214; Nellis v. Bradley, 1 Sand. 560.
[50] Norton v. Young, 3 Greenl. 33, note.
[51] Clough v. London, etc. R. Co., L. R. 7 Exch. 26.
[52] Ibid.
[53] See Barnard v. Campbell, 58 N. Y. 75.
[54] See 15 Am. L. Rev., 387.
[55] Page v. O'Neal, 12 Cal. 483; Sargent v. Sturm, 23 Cal. 359.
[56] Thompson v. Rose, 16 Conn. 71; Williamson v. Russel, 39 Conn. 406.
[57] Mears v. Waples, 4 Houst. 62; affirming s. c., 3 Houst. 581.
[58] Kern v. Thurber, 57 Ga. 172.
[59] Wilson v. Fuller, 9 Kan. 76.
[60] Arnett v. Cloudas, 4 Dana, 300; Wood v. Yeatman, 15 B. Mon. 271.
[61] Chicago Dock Co. v. Foster, 48 Ill. 507; Ohio, etc. R. Co. v. Kerr, 49 Ill. 558.
[62] Sharp v. Jones, 18 Ind. 314.
[63] Oswego Starch Factory v. Lendrum, December 20, 1881; 10 N. W. Rep. 900.
[64] Ditson v. Randall, 33 Me. 202; Titcomb v. Wood, 38 Me. 563.
[65] Powell v. Bradlee, 9 Gill. & J. 220; Hall v. Hinks, 21 Md. 506.
[66] Rowley v. Bigelow, 12 Pick. 307 (1832); Hoffman v. Noble, 6 Metc. 68; Moody v. Blake, 117 Mass. 23.
[67] Cochran v. Stewart, 21 Minn. 435.
[68] Lee v. Portwood, 41 Miss. 109.
[69] Kingsbury v. Smith, 13 N. H. 109; Willoughby v. Moulton, 47 N. H. 205.
[70] Root v. French, 3 Wend. 570, Barnard v. Campbell, 58 N. Y. 73; Stevens v. Brennan, 79 N. Y. 254.
[71] Dean v. Yates, 22 Ohio St. 388; Combes v. Chandler, 33 Ohio St. 178.
[72] Thompson v. Lee, 3 Watts & S. 479; Sinclair v. Healey, 40 Pa. St. 417.
[73] Avandale v. Morgan, 5 Sneed, 703; Hawkins v. Davis, 5 Jere Baxter, 698.
[74] Williams v. Given, 6 Gratt. 268; Steamship Co. v. Burckhardt, 31 Gratt. 664.
[75] Shufeldt v. Pease, 16 Wis. 689; Rice v. Cutter, 17 Wis. 372; Singer Manufacturing Co. v. Sammons, 49 Wis. 316.
[76] See the cases reviewed by Benjamin, and the later decisions of Attenborough v. Dock Co., 3 C. P. D. 450 (1878); and Babcock v. Lawson, 4 Q. B. D. 394, affirmed 5 Q. B. D. 284 (1880).
[77] George v. Kimball, 24 Pick. 241, per Morton, J.

Sales fitly remarks on this point: "In some cases it is assumed that when a sale of goods is procured by fraud of the vendee, no title passes to him, but the vendor still retains the legal right in the goods, and hence it is concluded that a person who has no title to goods can convey none."[78] But, at the same time, it is agreed that a third person may acquire a good title from a fraudulent vendee by giving him value for the property, or incurring some responsibility upon the credit of it, without notice of the fraud. In such a case, it is said that the superior equity of the innocent purchaser is allowed to overcome the legal rights of the owner; and it is said to be the single instance in which our law divests the title to property without the owner's consent or default.[79]

"The difficulty," remarks the commentator, "consists in tracing the title and reconciling the right of the defrauded vendor to reclaim his property in the hands of his fraudulent vendee, with the vesting of the title in such purchaser. This difficulty is obviated, however, by adopting the doctrine of the text —that the contract is not void *ab initio*, but is voidable at the option of the vendor, as between him and the vendee, and those claiming under him, without consideration, or with notice of the fraud. The reference in these comments is to the English doctrine, embodied in the authorities already cited herein as establishing the protection of *bona fide* purchasers from fraudulent vendees.

The same view, that the fraudulent vendee has a title though it, is voidable and defeasible at the option of his vendor, widely prevails in America. It was clearly announced in the case of Rowley v. Bigelow,[80] has been explained in other cases,[81] and has been adopted not only in Massachusetts, but also in New Hampshire,[82] Maine,[83] Delaware [84] and Virginia.[85] It has also received support directly and indirectly in New York.[86] But the prevailing tendency in that State, as well as in Maryland [87] and Ohio,[88] is to lay most stress upon the principle that the rightful owner is estopped from asserting his right when the act of conferring upon his vendee the possession [and the *indicia* of title], has led to the payment by an innocent purchaser. At the same time, the superior equity of the innocent purchaser is regarded as an element of importance and even, in the latest instance, his defeasible title.[89] It would unduly extend the limits of the present article to show the scope and limits of the term "*bona fide* purchasers" in this connection, but these particulars may readily be presumed from similar transactions in conveyances of real property and transfers of negotiable paper.

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78 The words "hence it is concluded," should rather read "it is also declared."

79 Fancher, J., in Barnard v. Campbell, 65 Barb. 288, 289; S. C., 58 N. Y. 73; Root v. French, 13 Wend. 570; Monrey v. Walsh, 8 Cow. 238; Hoffman v. Carew, 22 Wend. 218; Ash v. Putnam, 1 Hill (N. Y.) 307; Hunter v. Hudson River Iron and Machine Co., 20 Barb. 493; Williams v. Birch, 6 Bosw. 299.

80 12 Pick., 312.

81 Stevens v. Hyde, 33 Barb. 180; Somer v. Brewer, 2 Pick. 184, 201; Ayres v. Hewit, 19 Me. 281.

82 Kingsbury v. Smith, 13 N. M. 109.

83 Titcomb v. Wood, 38 Me. 563.

84 Mears v. Waples, 3 Houst. 581; S. C., 4 Houst. 62.

85 Williams v. Given. 6 Gratt. 268; Steamship Co. v. Burckhardt, 31 Gratt. 664.

86 See Keyser v. Harbeck, 3 Duer, 373; Stevens v. Hyde, 33 Barb. 180; Padden v. Taylor, 44 N. Y. 371.

87 Hall v. Hinks, 21 Md. 418.

88 Combes v. Chandler, 33 Ohio St. 184.

89 Barnard v. Campbell, 58 N. Y. 73.

A REASONABLE DOUBT.

Probably no principle of the law is more universally understood by the class of persons who serve on our juries than this: That the prisoner on trial for a crime is entitled to an acquittal if the jury have a reasonable doubt as to his guilt. What is a reasonable doubt is very difficult of a clear definition. It has perplexed jurymen; and courts, in their attempts to explain it, have found it a stumbling block in their paths. In many cases, attempts from the bench to elucidate the term and give to it a definition, have been productive of more evil than good, and have led the jury to an acquittal when there should have been a conviction. Often the juries have mistaken the meaning of a reasonable doubt, believing it to be the least imaginary doubt which might enter their minds, and have acquitted the defendant when the evidence was strong against him. There is a distinction to be made between civil and criminal cases in this respect; in the one, the jury weigh the evidence on both sides, and decide accord-

ingly; but, in criminal cases, the defendant's guilt must be proved beyond a rational doubt, or the jury can not convict. It is chiefly to criminal cases that we shall confine ourselves in treating the subject of a reasonable doubt, as in these it more frequently arises, and has been more frequently adjudicated upon by the superior courts.

Some definitions which the courts have laid down as to what should constitute a reasonable doubt, might not be out of place. Chief Justice Shaw has defined it to mean, "Not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, they can not say they feel an abiding conviction to a moral certainty, of the charge." [1]

This reasonable doubt should be actual and substantial, and not based upon a mere possibility or imagination. It must be such a doubt that the jury can give a reason for.[2]

If the guilt of the prisoner be established by a chain of circumstances, and the jury have a reasonable doubt as to any one of the links in the chain, it ought not to have any influence with them in making up their verdict.[3] It is such a doubt as would cause a reasonable and prudent man to pause and hesitate before acting in the more important affairs in life, or that would cause him to act with the same degree of caution if acting in his own more consequential affairs.[4]

This doctrine is at variance somewhat with the weight of authority, the courts holding that a charge that if the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, is erroneous; that it requires nothing more than a mere preponderance of evidence to convict the prisoner.[5] California courts define a "reasonable doubt of the guilt of a person" to be "that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they say they can not feel an abiding conviction to a moral certainty, of the truth of the charge.[6]

In a Mississippi case it is said: "That which amounts to a mere possibility only, or to conjecture or supposition, is not what is meant by a reasonable doubt. The doubt which should properly induce a jury to withhold a verdict, should be such a doubt as would reasonably arise from the evidence before them.[7]

The Supreme Court of Alabama has condemned the practice of giving definitions of a reasonable doubt, saying: "We think all such efforts, to say the best for them, are unsafe, indiscreet, and oftener than otherwise, distract and confuse juries, and may lead them to acquit where they ought to convict."[8] It is not necessrry that the whole jury should have a doubt as to the prisoner's guilt; if a reasonable doubt exists in the mind of any one juror as to the defendant's guilt, there should be no conviction.[9] The definition given by Chief Justice Shaw has been almost universally accepted as being less liable to confuse the jury than some of the others; but we can not but agree with the Alabama court, who condemn the practice of explaining to the jury the meaning of a reasonable doubt. The simple statement to a jury of average intelligence, that the doubt must arise in the case before them, or that nothing occurring outside the proof in the case should influence their verdict, would generally be sufficient to enable them to understand the meaning of a reasonable doubt.

[1] Commonwealth v. Webster, 5 Cush. 320; Commonwealth v. Goodwin, 14 Gray, 55.

[2] Commonwealth v. Harman, 4 Barr. 270; Pate v. People, 3 Gillman, 644; United States v. Foulke, 6 McLean (Cir. Ct.), 349; Giles v. State, 6 Ga. 285; State v. Schoenwald, 31 Mo. 147; Winter v. State, 20 Ala. 39; 3 Greenl. Ev., sec. 29; Earll v. People, 73 Ill. 329.

[3] Sumner v. State, 5 Blackf. 579; Houser v. State, 58 Ga. 78; Jarrell v. State, 58 Ind. 293; State v. Hayden, 45 Iowa, 11; State v. Felker, 32 Iowa, 53; Smith v. People, 74 Ill. 144.

[4] May v. People, 60 Ill. 119; Miller v. People, 39 Ill. 457.

[5] People v. Brannan, 47 Cal. 96; People v. Ah Ling, 51 Cal. 372; State v. Oscar, 7 Jones (N. C.), 305; Jane v. Commonwealth, 2 Met. (Ky.) 30; Anderson v. State, 41 Wis. 430; State v. Rour (Nev.), 3 Law & Eq. Reporter, 422, overruling State v. William, 3 Nev. 409; Bradley v. State, 31 Ind. 492; State v. Bruce, 48 Ia. 530; State v. Northrup, 48 Ib. 583.

[6] People v. Ash, 44 Cal. 288. See, also, People v. Finney, 38 Mich. 482; Webster's Case, 5 Cush. 320; Commonwealth v. Carry, 2 Brews. (Pa.) 404.

[7] Bowler v. State, 41 Miss. 571. See Wise v. State, 2 Kan. 419; State v. Ford, 21 Wis. 610; State v. Shettleworth, 18 Minn. 209; State v. Fiugate, 27 Mo. 535. But see Dinsmore v. State, 67 Ind. 306.

[8] McAlpine v. State, 47 Ala. 78; Tuberville v. State, 40 Ala. 715.

[9] State v. Rodaback, 19 Ia. 154; State v. Stewart, 2 Hawley's Crim. Rep. 603.

It is more frequently a question to be left solely to the jury, as to what must constitute a reasonable doubt, and the circumstances of each particular case must control their verdict. That which might be sufficient to raise a reasonable doubt in one case, might in another, where connected with different circumstances, not be of ample consequence to cause the shadow of a doubt to cross the minds of the jurors.

Each individual juror must be governed by his own sense of morality and sound judgment, and his verdict should be accordingly. A biased juror in favor of the prisoner would always have a reasonable doubt, but it would exist the same were the court to define a reasonable doubt, and endeavor to elucidate its meaning.

It is, then, for the jury to determine, without aid from the court, whether such a doubt exists as will warrant an acquittal of the prisoner, and no tribunal can ever know whether they acted wisely or unwisely.

ADDISON G. MCKEAN.

CONSTITUTIONAL LAW — TELEGRAPH COMPANIES—STATE TAXATION.

WESTERN UNION TEL. CO. v. STATE OF TEXAS.

Supreme Court of the United States, April 3, 1882.

1. A tax by the State upon telegraphic messages sent to points without the limits of the State is unconstitutional, as being a regulation of inter-State commerce.

2. A tax upon government messages is void, as being a burden upon Federal agency.

In error to the Supreme Court of the State of Texas.

Mr. Chief Justice WAITE delivered the opinion of the court:

The Western Union Telegraph Company is a New York corporation engaged in the business of transmitting telegrams at fixed rates of compensation. Its lines extend into and through most of the States and Territories of the United States, and to Washington, in the District of Columbia. It has availed itself of the privileges and subjected itself to the obligations of tit. LXV. of the Revised Statutes relating to telegraph companies, and its lines connect with those owned and established by the government of the United States for public purposes. It has one hundred and twenty-five offices in the State of Texas, and is in close communication with other telegraph companies doing business in this country and abroad.

By the Constitution of Texas, art. VIII., sec. 1, the legislature is authorized to "impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing business in the State;" and by art. 4655 of the Revised Statutes, enacted under this provision of the Constitution, every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full rate message sent, and one-half that for every message less than full rate. This tax is to be paid quarterly to the comptroller of the State on sworn statements made by an officer of the company. In addition to this, taxes must be paid on the real and personal property of the company in the State.

Between October 1, 1879, and July 1, 1880, the company sent over its lines from its offices in Texas 169,076 full rate, and 100,408 less than full rate, messages. A large portion of these messages were sent to places outside of the State, and by the officers of the government of the United States on public business. The company neglected to pay the tax imposed, and a suit was brought in one of the courts of the State for its recovery. In defense it was insisted that the law imposing the tax was in conflict with the Constitution and laws of the United States, and, therefore, void. The Supreme Court of the State, on appeal, sustained the law, and directed judgment against the company for the full amount claimed, allowing no deductions for messages sent out of the State, or by government officers on government business. To reverse that judgment this writ of error has been brought.

In Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and inter-State business. A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege, those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the postmaster general. Thus, as to government business, companies of this class become government agencies. The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and inter-State commerce, and of a government agent for the transmission

of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States. In The State Freight Tax Case, 15 Wall. 232, this court decided that a law of Pennsylvania requiring transportation companies donig business in that State to pay a fixed sum as a tax, "on each two thousand pounds of freight carried," without regard to the distance moved or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and inter-State commerce. In this the court but applied the rule, announced in Brown v. Maryland, 12 Wheat. 444, that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are Welton v. Missouri, 91 U. S. 275; Cook v. Pennsylvania, 97 U. S. 566, and Webber v. Virginia, 103 U. S. 344. And in the Passenger Cases, 7 How. 283; Crandall v. Nevada, 6 Wall. 35, and Henderson v. Mayor, 92 U. S. 259, taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers; and in the State Tonnage Cases, 12 Wall. 204; Peete v. Morgan, 19 Wall. 581; Cannon v. New Orleans, 20 Wall. 577, and Inman Steamship Co. v. Tinker, 94 U. S. 238, that taxes on vessels according to measurement, without any reference to value, were taxes on tonnage.

The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and inter-State commere and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in McCulloch v. Maryland, 4 Wheat. 316, and has never been doubted since.

It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State and as to which we have no power of review.

The judgment of the Supreme Court of Texas is reversed, and the cause remanded with instructions to reverse the judgment of the district court and proceed thereafter as justice may require, but not inconsistent with this opinion.

CORPORATIONS—CAPITAL STOCK—BONA FIDE PURCHASERS — SUBSCRIPTION PAID IN PROPERTY.

BRANT v. EHLEN.

Maryland Court of Appeals.

1. The capital stock of a corporation is a trust fund for the payment of its debts; but where stock is issued as full paid, which is not full paid, and comes by assignment into the hands of *bona fide* purchasers for value, who believe it to be full paid, it can not be followed by creditors.

2. A company may issue full paid stock in payment for any property which it is authorized by its charter to purchase, and in the absence of fraud the law will regard this as full paid stock.

ROBINSON, J., delivered the opinion of the court:

The Virginia Coal and Iron Company of Hampshire County, West Virginia, was incorporated on the 16th of August, 1865, for the purpose of mining and shipping coal and other minerals, with a capital stock of $625,000, divided into 125,000 shares, of the value of $5 per share; 5,000 shares of which were subscribed and paid for by the five incorporators.

At a meeting of the stockholders held on the 30th day of August, Ehlen, in behalf of himself

and other incorporators, offered to sell to the company a tract of coal land known as the "Sinclair Farm," for $500,000, the purchase money to be paid as follows: $25,000 in cash, and the balance, $475,000, to be paid in the stock of the company. This proposition was accepted, and the shares of stock were issued accordingly and delivered to the vendors in payment of the purchase money.

In pursuance of the terms of purchase, the company took possession of the property and began the mining and shipping of coal, and whilst thus in possession suit was brought by the appellant in the United States Circuit Court for the District of West Virginia, claiming title to an undivided seven-eighth interest in said tract of land. The decision in the circuit court was in favor of the company, but on appeal to the Supreme Court of the United States this decision was reversed, and the appellant's title to the land was established. Subsequently a decree was obtained by him against the company for the sum of $320,049, with interest from June 1, 1877, on account of the coal taken by it from the land of the appellant. This suit is instituted to enforce the payment of this decree against the appellees as stockholders in said company. The bill alleges that the corporation is insolvent, and that at least ninety per cent. of the shares of stock held by the appellees remains unpaid; and that the unpaid instalments constitute part of the assets of the company, and as such subject to the payment of creditors.

These shares were issued by the company as full paid shares. The certificates are in the ordinary form of full paid stock, with nothing on their face to indicate that they were not fully paid; and, with the exception of Ehlen, they were purchased and held by the defendants as full paid shares, with no notice of fraud or irregularity in their issue.

In the view we take of the case, it is unnecessary to consider the many questions so elaborately argued at bar, for the liability of the defendants after all may be said to depend on the following questions:

First. Whether as *bona fide* transferees of shares of stock issued by the company to the original subscribers as full paid shares, and sold by them as such, the defendants are liable in an action by a creditor of the company for unpaid instalments on said shares, if it should turn out that they were not in fact full paid shares?

Second. Whether the company had the power under its charter to buy coal land for mining purposes and to pay for the same in the stock of the company?

As to the first, were it a question of first impression, we do not see on what grounds the liability of the defendants as *bona fide* transferees could be maintained. The liability for subscription to the stock of a corporation is founded on contract. Where one agrees to take a certain number of shares, the law implies a promise to pay for them according to the terms of his subscription. If they are sold before all the instalments are paid, and are bought with such knowledge, the law implies a promise on the part of the purchaser to pay whatever may be due thereon according to the terms of the original subscription. In such cases the purchaser stands in the shoes of the original subscriber. These are elementary principles, about which there can be no contention. But where shares are issued by the company to the subscriber as full paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied on the part of the purchaser without notice, to be answerable either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full paid shares; and if it be said that the shares were fraudulently issued he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud. The company beyond all question could not, under such circumstances, maintain action against him, because it would be estopped by its own acts and declarations. But the argument is, that independent of the relation of debtor and creditor between the stockholders and the company growing out of the contract of subscription, there is another relation which the subscriber sustains to the creditors upon the insolvency of the company. That, as to them, the unpaid subscription constitutes a trust fund, which it is beyond the reach of any agreement between him and the company to divest or impair.

In speaking of the assets of an insolvent corporation as constituting a trust fund for the payment of creditors, it is necessary to understand precisely what is meant by the court.

No one will pretend for a moment that, in subscribing to the stock of a company, the purpose is to create a trust fund for creditors. On the contrary, the object primarily is to furnish means to carry on its business, and to share the profits earned by the corporation, and so long as it is a going concern it has the right, and indeed it is the duty, to manage and dispose of its assets, including stock subscriptions, for the promotion of its own interest. If it ceases to do business, or if it becomes insolvent, then all assets which it then has or owns, including paid and unpaid subscriptions, either in the hands of the origiaal subscriber, or in the hands of his assignee with notice, become a trust fund for the payment of creditors, and they have a right to follow the property constituting this fund, and subject it to the payment of their debts, unless it has passed into the hands of a *bona fide* purchaser without notice. And, further, if there has been any fraudulent or collusive disposition of the assets of the corporation, all who participated in the fraud may be held liable to the creditors. In Sanger v. Upton, 91 U. S. 60, where this doctrine of trust funds is as

strongly asserted as in any other case, the court say: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. If diverted, the creditors may follow it so far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice."

This is what the courts mean in speaking of the assets of an insolvent corporation constituting a trust fund for the payment of creditors, and, as thus understood, it furnishes no ground on which the liability of the defendants, as *bona fide* purchasers of stock issued as full paid, can be maintained, although such stock was not in fact full paid. If this is so, on what other ground is the superior equity of the creditor based? It was said the purchaser ought to ascertain by inquiring whether the stock issued by the company was in fact full paid. It must be admitted, however, that this obligation rests with equal, if not greater force on the creditor. He deals directly with the company, and has, it is fair to presume, greater means and facilities for ascertaining its real condition and its claims to confidence and credit than the purchaser of stock which is sold on the market; and sold, too, in many instances, at a distance from the company's place of business. Shares of stock are not, strictly speaking, negotiable instruments, but courts speak of them as *quasi* negotiable; and when they are issued as full paid shares, and as such sold in open market, the purchaser is not bound to suspect fraud where everything seems fair and conformable to the requirements of the law. Any other doctrine would virtually destroy the transferable nature of such shares and paralyze the whole of the dealings in the stock of corporations. Burkinshaw v. Nicholls, 26 W. R., H. L. 821.

Were this then a question to be determined on principle, we do not see on what grounds these defendants could be justly held liable to the creditors of the company. And such seems to be the whole current of decisions both in England and in this country. In Nicholls' Case (Court of Appeals, 26 Weekly Rep. 334), shares were issued by the company as full paid, when in fact there was no payment in money nor registration of the contract of subscription as required by the company's act of 1867, and upon the winding up of the company some of these shares were held by Nicholls' trustee as transferred without notice; that such shares had not been paid in money. Suit was brought by the official liquidator against Nicholls for contribution, and the court held that he was not liable. "When you have a receipt given by the company, or a final receipt as a certificate of payment," said Jessell, M. R., "what more is a *bona fide* purchaser to ask for? and what occasion has he to make any further inquiry? He has the representation of the company that the shares are fully paid up. It appears to me impossible that the company should be allowed to say the shares were not paid in due course."

On appeal, the judgment in this case was affirmed by the House of Lords; and in speaking of the rights of the defendant as a *bona fide* purchaser, without notice, Lord Cairns said: "He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in company's shares if a person taking shares with a representation that they are fully paid up must disregard this assertion, and satisfy himself of the fact by personal inquiry." And in Bush's Case, L. R. Ch. App. 555, where shares were allotted to Tucker as full paid shares, and by him transferred to the defendant as such, when in fact no money had been paid as required by the Companies' Act, the appeal was spoken of by Sir William M. James "as an idle and vexatious appeal."

And in the still later case of Waterhouse, Law Rep. Scotch & Divorce App., vol. 2, Lord Westberry said: "The appellant is a *bona fide* holder of shares, upon which, no doubt there was a false statement made by the company of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore can not be subjected to liability by having imputed to him knowledge of the falsehood."

Against the force of these decisions it is argued that the English courts accord to creditors of insolvent corporations such rights only as the official liquidator can assert in the name of the corporation and through its contracts; and that the ground on which a *bona fide* purchaser of stock issued as full paid, is held not to be liable, although such stock was not in fact full paid, is that the liquidator is estopped from denying the representation made by the company, upon the faith of which others have been induced to purchase the stock. In this country, however, it is said the courts accord to creditors rights growing out of the relation of stockholder, which upon the insolvency of the corporation attach at once to unpaid shares, whether in the hands of the subscriber or his assignee, and that the inquiry here is not whether the holder took the stock in good faith, believing it to have been paid up, but whether the stock has in fact been fully paid.

This distinction is not, we think, supported by the decided cases. On the contrary, all the decisions in this country agree that the right of the creditor to recover against the stockholder rests on the liability of the latter to the corporation, and that this liability is one founded on contract. Where shares of stock are issued to be paid in certain installments, the law implies a promise on the part of the subscriber and his assignee, that they will pay whatever may be due thereon according to the terms of the subscription. But where shares are issued as fully paid, and these are sold in open market, and one buys them in good faith on the representation of the company that they are paid up, no promise can be implied on the part of the purchaser to become liable, if such shares have not in fact been paid. He is not bound to suspect fraud in issuing the stock, and

the remedy of the creditor in such cases is against the parties to the fraud.

In Foreman v. Bigelow, 4 Clifford, 509, and Stracy v. Little Rock R. Co., 5 Dillon, 348, the whole subject was considered and the English doctrine was fully approved. In the one Justice Clifford quotes with approval the opinion delivered by James, L. J., and Thesiger, L. J., in Nicholls' case, and in the other Justice Dillon relies on the opinions of Lords Cairns, Hatherley, Selbourne and Blackburn, delivered in the same case on appeal to the House of Lords. And in all the cases relied on by the appellant as sustaining a contrary doctrine, it will be found, either that the certificates on their face showed that the shares of stock were not in fact full paid, or the facts and circumstances accompanying the transfer were such as to put the purchaser on the inquiry. Upton, assignee, 3 Bissell, 417; Upton v. Tubiecock, 91 U. S. 45; Boreman's Case, 12 Conn. 530; Bend v. Susquehanna Bridge Co., 6 H. & J. 126; Hall v. U. S. Ins. Co., 5 Gill, 484; Palmer v. Laurence, 3 Sandford, Sup. Ct. 161.

The only remaining question to be considered is whether the company had the power under its charter, to purchase coal land for mining purposes, and to pay for the same in the stock of the company. And in dealing with this question we must bear in mind that the company was incorporated for the purpose of mining and shipping coal, and that under the laws of West Virginia it had the power to purchase and hold mineral lands to the extent of ten thousand acres. Now we take the law to be well settled that a company may receive in payment of its shares of stock any property which it may lawfully purchase, and so long as the transaction stands unimpeached for fraud, courts will treat as a payment that which the parties themselves shall have agreed shall be a payment, and this, too, in cases where the rights of creditors are involved. Waterhouse v. Jamison, L. R. 2 H. L., sec. 29; *Ex parte* Curian, 32 L. J. Ch. 57; Carling's Case, 1 Ch. Div. 115; Nicholls' Case, 26 W. R. H. L. 821; Foreman v. Bigelow, 4 Clifford, 508; 5 Dillon, 367. The right of the Virginia Coal and Iron company to purchase coal land for mining purposes, and to pay for it out of the subscriptions to its capital stock, is conceded. If so, what reason can there be in requiring that the money for the stock shall in fact be paid to the company, and at the same moment be handed back to the vendor in payment of land? The passing of the money backwards and forwards would be an idle form, and so the courts regard it. In Spargo's Case, 8 L. R. Ch. App. 412, Sir Wm. M. James, L. J., said: "If there was on the one side a *bona fide* debt, payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares, so that if hand notes had been handed from one side of the table to the other in payments of calls, they might legitimately have been handed back in the payment of the property, there is no necessity that the formality should be gone through with of the money being handed over and taken back; but that if the two demands are set off against each other the shares have been paid for in cash."

Miller, J.: "It is a general rule of law that in every case where the transaction resolves itself into the payment of money by A to B, and then handing it back by B to A, if the parties meet together and agree to set the one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

The bill in this case does not seek to set aside the sale of the coal land to the company on the ground of fraud, and we must therefore deal with this question upon the assumption that the sale and purchase were made in good faith.

The company, it is true, agreed to pay $500,000 for the coal land purchased of Ehlen and others; but $475,000 of the purchase money was paid in the stock of the company, and the balance, $25,000, was paid by the vendors themselves for the 5,000 shares subscribed for by them, So, after all, the value of the stock received in payment of the land depended on the value of the property purchased by the company.

It follows from what we have said that the stock thus issued to Ehlen and others in payment of the land must, in the absence of fraud or collusion, be treated as paid up stock, and as such the holders can not be held personally liable to the appellant.

We find nothing in the Code of West Virginia, under which the company was chartered, inconsistent with these views.

The decree of the court dismissing the bill will therefore be affirmed.

PROMISSORY NOTE — CONSIDERATION — FRAUDULENT CONVEYANCE.

BUTLER v. MOORE.

Supreme Court of Maine, January 11, 1882.

In an action against the maker of a promissory note given as the consideration of a conveyance received for the purpose of aiding the grantor to delay his creditors, the fraud cannot be set up in defense.

Assumpsit on the following note:

"$1,000. March 26, 1874.

For value received, I promise to pay Casper E. Marshall, or order, one thousand dollars on demand, with interest annually.

GEO. MOORE."

Indorsement thereon, "Without recourse,

C. E. MARSHALL."

The plea was general issue and the following:

"And the defendant comes and defends, etc., when, etc., and says that the note declared upon in plaintiff's declaration, was obtained by Casper E. Marshall, payee in said note, for the purpose

of aiding the said Marshall in hindering, delaying and defrauding the creditors of said Marshall, and for no other purpose, and this he is ready to verify. Wherefore he prays judgment and for his costs.

By his attorneys,

COPELAND & EDGERLY."

The opinion states the material facts.

G. C. Yeaton and *H. V. Moore*, for the plaintiff; *Copeland & Edgerly*, for the defendant.

VIRGIN, J., delivered the opinion of the court:

One view of the facts in this case as they are testified to by the defendant, that in receiving the deed from Marshall he did not intend any wrong; that he never expected to pay the note which he gave to Marshall as a consideration for the deed; that it was distinctly understood that it was not to be paid and that the deed was to be given back, is so like those in Bryant v. Mansfield, 22 Me. 360, as to render the language of the court in the latter case peculiarly apt here. "If the transaction," says Shepley, J., "be considered with reference to the parties alone, it presents the case on paper of a conveyance of real estate and a payment for it by note, with an alleged verbal agreement that the note should be returned to one party, and the estate be reconveyed to the other. And such a parol agreement to destroy the effect of the deed of conveyance and of the note could no more be received in equity than in law."

Again, taking the testimony of the defendant to be true, there was no such fraudulent conveyance as even creditors of Marshall could impeach. For the defendant unqualifiedly denies all wrongful intent on his part in accepting the deed from Marshall and giving him his note. Nor is there any evidence of Marshall's indebtment to any creditor. And whatever the original transaction may have been, the defendant has never been solicitous to rescind the contract. The parties being tenants in common after the conveyance caused it to be taxed to them both ever after, and each paid one-half of the taxes as they were assessed. In 1876 they sold a house lot, they both agreeing upon the price and dividing the sum received therefor; and in like manner they sold three other house lots, thus disposing of three of the ten acres. We perceive no fraud upon creditors, or upon each other, here. At any rate, no creditor has ever undertaken to disturb the defendant's title, which is still in him except as to the portion sold.

There is still another view of the case. Assuming the note in suit to have been dishonored before it was indorsed to the plaintiff, and taking the same view of the testimony as the court did in Bryant v. Mansfield, *supra*, that and the defendant's second plea presents the question: Whether one who has received a conveyance of land and in consideration thereof has given his negotiable promissory note to the grantor, for the purpose of aiding him in delaying his creditors, can set up the fraud in defense to an action on his note brought by the grantor? And, after a careful examination of the numerous cases on the subject in the various jurisdictions where it has been considered, we think the better opinion is opposed to such defense.

We derived our law in relation to conveyances fraudulent as to creditors from the statute 13 Eliz. c. 5, which has been adopted here as common law. Howe v. Ward, 4 Me. 196, 199. This statute, declaring that conveyances made with intent to "delay, hinder or defraud creditors," shall be "deemed and taken (only as against creditors, etc.) to be clearly and utterly void, frustrate and of none effect," has been invariably construed as plainly implying that they are valid as between the parties and their representatives (Nichols v. Patten, 18 Me. 231; Andrews v. Marshall, 43 Me. 274; Benj. Sales (3d Am. ed.) 478 and note); and can be avoided only by creditors on due proceedings (Miller v. Miller, 23 Me. 22; Thompson v. Moore, 36 Me. 47; Stone v. Locke, 46 Me. 445); or their representatives, such as assignees in bankruptcy or insolvency of the grantor (Freeland v. Freeland, 102 Mass. 475, 477) and the executors or administrators of grantors since deceased whose estates have been declared insolvent. McLean v. Weeks, 65 Me. 411, 418. And notwithstanding the words "utterly void," etc., applied to such conveyances, they are not, even as to creditors void and voidable. Andrews v. Marshall, *supra*. And all the courts concur in holding that if the fraudulent grantee convey the premises to a *bona fide* purchaser for a valuable consideration before the creditor moves to impeach the original conveyance, the purchaser's title can not be disturbed. Neal v. Williams, 18 Me. 391; Hoffman v. Noble, 6 Met. 68; Bradley v. Obear, 10 N. H. 477.

It is generally true that the law will not aid parties violating its express or implied rules, in executing their unlawful contracts, or afford them relief from their effects when executed. In such cases the old maxims, *ex turpi causa* and *in pari delicto*, stand like walls against the parties. The implication of the statute of 13 Eliz. declares that as between the parties to a conveyance made to prevent creditors of the grantor from attaching or seizing his property, and thereby securing their debts, the transaction is not to be regarded void or voidable, but valid. And if valid, we fail to see why the note given in payment is not also valid. The transaction is not a *turpi causa*, and neither do the parties stand in *pari delicto*. In the case at bar, each of the parties deliberately entered into the contract. Each received a full consideration, the one for his land and the other for his note. Neither of them was defrauded. So far as their intention backed up by their acts affected any creditor of the grantor, the creditor thereby defrauded has full remedy; for he may attach the property, before it is sold to a *bona fide* purchaser, or he may recover twice its value not exceeding twice the amount of his debt in an action on the case under the provisions of R. S., c. 113, sec. 51.

The decisions in Massachusetts, repeatedly made, sustain actions like this. See the two opinions of Morton, J., and of Shaw, C. J., after the second trial in Dyer v. Homer, 22 Pick. 253; Butler v. Hildreth, 5 Met. 49, 50. Bailey v. Foster, 9 Pick. 139, recognizes the same doctrine. See, also, Harvey v. Varney, 98 Mass. 118, where the cases are reviewed and the doctrine adhered to. See, also, the elaborate opinion of the Chief Justice of Wisconsin, in Clemmens v. Clemmens, 28 Wis. 637, and the well reasoned opinion of the court in Carpenter v. McClure, 39 Vt. 9. See, also, the numerous cases cited in the plaintiff's brief.

We are aware that the early decisions in our own State are somewhat inconsistent. Smith v. Hubbs, 10 Me. 71; Nichols v. Patten, 18 Me. 221; Ellis v. Higgins, 32 Me. 34; Andrews v. Marshall, *supra*; s. c., 48 Me. 26. But in none of these cases was this precise question presented, although it was discussed. We think, however, the better doctrine is the one held by the cases above cited.

In Ellis v. Higgins, and Andrew v. Marshall, 48 Me. 26, the question was raised (though not by counsel in this case) as to the effect of Rev. Stat., ch. 126, sec. 2, which makes parties to a conveyance fraudulent as to creditors liable to fine and imprisonment, and is therefore prohibitory in its character. And it was decided that it did not make such conveyance void as to parties. This provision first came into the statute in 1841, Rev. Stat., ch. 161, sec. 2. It is substantially a transcript of St. 13 Eliz., ch. 5, sec. 4, and hence was common law here before it was adopted by the legislature. The two rules should be construed together now, the same as if both were statute provisions or both rules of the common law, and the construction given them to harmonize them so that they both shall stand, which results from holding that while one impliedly prohibits conveyances, fraudulent as to creditors, the other limits or restricts the invalidating effect of the prohibition to the creditors or their representatives, whose debts are attempted to be avoided. Carpenter v. McClure, *supra*, where the statute of Vermont having both sections of 13 Eliz., ch. 5, is discussed and construed.

We perceive no legal reason for deducting from the amount of the note the sum of four hundred and twenty-five dollars, received for sales of the four lots of land.

Judgment for the plaintiff for the amount of the note sued on,

APPLETON, C. J., WALTON, BARROWS, DANFORTH AND SYMONDS, JJ., concurred.

MANDAMUS— JURISDICTION — CONSTITUTION.

STATE EX. REL. v. LAUGHLIN.

Supreme Court of Missouri, May 22, 1882.

1. Where an inferior court has improperly sustained a plea to the jurisdiction in a cause before it, *mandamus* will lie in the Supreme Court to compel the judge of such inferior court to proceed with the cause, although he may be of the opinion that his court has no jurisdiction, and so alleges in his return.

2. The title of the act of the legislature of March 9, 1881, which is as follows: "An act to amend section 1547 of art. 8, of the Revised Statutes, relating to offenses against public morals and decency, or the public police and miscellaneous offenses," is sufficient, under sec. 28, art. IV, of the Constitution, which declares that "No bill * * * * shall contain more than one subject, which shall be clearly expressed in the title."

Original proceedings by *mandamus* in the Supreme Court:

Harris, Bliss & Lodge, for relator; *Patrick & Frank*, and *F. D. Turner*, for respondent.

HOUGH, J., delivered the opinion of the court:

At the March term, 1882, of the St. Louis Criminal Court, the grand jury returned an indictment against R. C. Pate and others therein named, charging them with feloniously setting up and keeping a certain gambling device adapted, devised and designed for the purpose of playing a certain game of chance, commonly called keno, for money, and for feloniously inducing and enticing and permitting certain other persons, by means of said gambling device, to bet and play at said game of keno for money.

The defendant in said indictment filed a plea to the jurisdiction of the criminal court, alleging that the act of March 9, 1881, making gambling of certain kinds a felony, under and by virtue of which act the grand jury found and filed said indictment, was unconstitutional and void, because the title of said act does not meet the requirements of section 28, article IV of the Constitution, and for other reasons which it is unnecessary to notice, that the offense charged was therefore a misdemeanor only and not a felony, and said court had no jurisdiction thereof. After hearing said plea, and on the first day of May, 1882, the criminal court made the following order: "This day the court sustains the plea and the amended plea to the jurisdiction in each and all of the above cases, and it appearing to the court that the offenses charged in said indictments are misdemeanors, and the St. Louis Criminal Court having exclusive jurisdiction of such cases, it is ordered that each and all of said indictments be certified and transmitted to the said St. Louis Court of Criminal Correction for trial."

On the following day the circuit attorney for the city of St. Louis made application to the St. Louis Criminal Court to vacate and set aside the foregoing order and to proceed with the trial of said

indictments, which said court refused to do, and he now makes application to thi court for a writ of *mandamus* to compel the judge of said court to proceed with the trial of the indictment aforesaid.

The writ of *mandamus* is one mode of exercising the superintending control over inferior courts conferred on this court by the Constitution. It is well settled, too, that this writ can be resorted to in criminal cases as well as civil. Bishop on Crim. Proc., sec. 1402, and cases cited. In neither class of cases however can this writ be made to perform the functions of a writ of error or an appeal. When addressed to subordinate judicial tribunals, it simply requires them to proceed to exercise their judicial functions. State *ex rel.* v. Lafayette County, 41 Mo. 224; State *ex rel.* v. Garesche, 65 Mo. 489; State *ex rel.* v. Macon County Court, 68 Mo. 48; Bishop's Crim. Proc., sec. 1403, and cases cited. Of course this court would not compel an inferior court to proceed to try a case of which it had no jurisdiction, and where an inferior court refuses to proceed and finally dispose of a case, on the ground of an alleged want of jurisdiction, on application made to this court to compel such inferior court to hear the same it will be the duty of this court to determine whether such inferior court has jurisdiction of the cause, and such determination will be binding upon the inferior court. This is established by all the authorities.

The peculiar character of the order made by the criminal court in sustaining the plea to the jurisdiction relieves us of the necessity of examining and deciding many points which were presented in the oral agreement, and are to be found in the briefs of counsel, based upon the supposition that the indictment pending in the criminal court had been finally disposed of. By reference to the order of the court, however, it will be observed that the indictment has not been quashed nor adjudged defective or insufficient, neither has the prosecution been dismissed, nor have the defendants been discharged. The true and only legal construction which can be given to the order made by the criminal court is that the court has stricken the case from the docket, and refuses to proceed with the trial, although the indictment is still pending in that court, for the order to transfer the indictment to the court of criminal correction is wholly without warrant of law, and is utterly void. The criminal court could not divest itself of jurisdiction by any such order, and the indictment is still pending in that court, notwithstanding that order. The simple fact that the plea to the jurisdiction is sustained does not finally dispose of the case, and if the criminal court has jurisdiction of the offenses charged, we will compel the judge thereof to proceed with the cause, although he may be of the opinion that the court has no jurisdiction, and so alleges in his return. We are of the opinion that this is a proper case in which to issue the writ of *mandamus*, provided the criminal court has jurisdiction of the offense charged. Whether it has jurisdiction depends upon whether the offense charged is a felony, and whether said offense is a felony depends upon the constitutionality of the act of March 9, 1881, above referred to. All the objections to the validity of this law save the one relating to the title of the act are satisfactorily disposed of in the opinion of the judge of the criminal court, and it will be unnecessary therefore for us to say anything in regard to them. We will proceed to the title of the act. Section 28 of article IV of the Constitution, declares that "No bill * * * * shall contain more than one subject which shall be clearly expressed in its title." The title of the act of March 9, 1881, is as follows: "An act to amend section 1549 of article 8 of the Revised Statutes, relating to offenses against public morals and decency, or the public, police and miscellaneous offenses."

The section of the Revised Statutes, without regard to subject matter, are in pursuance of law, numbered successively and without omission from the beginning to the end of the volumes.

Article 8, of the chapter on crimes and punishments in the Revised Statutes of 1834, is entitled, "of offenses against public morals and decency, or the public, police or other miscellaneous offences," and embraces the same class of offenses now grouped under precisely the same title in article 8 of the chapter on crimes and punishments in the Revised Statutes of 1879. Article 8 of the chapter on crimes and punishments in the Revised Statutes of 1845, has precisely the same title and embraces the same class of offenses. So in the Revised Statutes of 1855, the same title embraces the same class of offenses. And in the Revised Statutes of 1865, as also in Wagner's Statutes of 1872, the same title is employed to designate the same class of offenses. This title therefore is no new combination of indefinite terms, but from long usage has come to have as definite a signification as the title "of the assessment and collection of the revenue," or any other title which has been continuously used for one and the same purpose from the beginning of the State government.

This court has repeatedly held that the provision of the Constitution now under consideration should be liberally construed. In the City of Hannibal v. County of Marion, 69 Mo. 571, speaking of this provision, we said: "Its object, as has been repeatedly observed, was manifestly to prevent and prohibit fraudulent legislation, or, in other words, the enactment of provisions to which no attention was given, by reason of their not being in reference to the subject indicated by the title. It was not the purpose however to require that the title of an act should refer literally to all the details which the general subject would suggest."

Now the title of the act in question not only refers to the title of the article, but to the particular section of that article sought to be amended; this constitutes the subject of the bill, and it is clearly expressed. The subject matter or contents of the section sought to be amended need not be stated in the title. An additional reason

for a liberal construction of this section of the Constitution is, that in the next preceding section (sec. 27, art. IV), it is provided that no bill can be passed by the legislature until it has been reported upon by a committee and published for the use of the members. Similar titles have been upheld in other States having constitutional provisions like our own.

The Constitution of Kansas provides that "No bill shall contain more than one subject, which shall be clearly expressed in the title." An act was passed in that State entitled, "An act to amend sections two, four, seventeen, forty and forty-nine, of an act entitled," etc. Speaking of this act, the Supreme Court of Kansas, in State v. Bankers' Association, 23 Kan. 501, said: "A certain subject is expressed in the title, *i. e.*, the amendment of five specific sections, so far as the act follows the title, it is without question; but it goes beyond, and after doing all that its title intimates that it will do, it reaches out for something entirely separate and independent." And in People *ex rel.* v. Judge of the Superior Court, 39 Mich. 195, a statute similarly entitled, though criticised, was held to be valid, *vide* also County Commissioners of Dorchester County v. Meekins, 50 Md. 28. The authorities however in our own State are conclusive upon this question.

In State v. Ranson, 73 Mo. 78, the constitutionality of an act having a title similar to that now under consideration, was upheld by the court. The discussion of the sufficiency of the title in that case was general, and there is nothing in this opinion to indicate a purpose, on the part of this court, to confine the ruling there made to acts passed at a revising session of the legislature for purposes of revision. The case was not considered by this court in that aspect. That case, though not citing the case of the City of Kansas v. Payne, 71 Mo. 159, is in entire harmony with it. The title of the act passed upon in the latter case is as follows: "An act to amend sections two, three, four, five, nine, eleven, fourteen, seventeen and eighteen of an act approved April 12, 1877, entitled, 'An act to provide for the collection of delinquent taxes due the State, and repealing sec. 184 of an act entitled an act concerning the assessment and collection of the revenue, approved March 30, 1872.'" The sections amended relate to various matters, but they all appropriately fall under the general title. This title was held to be good in itself, but was held to be insufficient to embrace a repeal of certain provisions of the charter of the City of Kansas, as it contained no index to the legislative intent to interfere with the city charter. The designation by number of the sections proposed to be amended was held to be sufficient, although the substance or purport of such sections was not set forth. Being of opinion that the title of the act of March 9, 1881, is sufficient, and the act therefore constitutional, and that the offense charged in the indictment therein referred to is a felony, a peremptory writ will be awarded. The other judges concur.

WEEKLY DIGEST OF RECENT CASES.

AGENCY—INDIVIDUAL LIABILITY OF AGENT.

Bingham v. Stewart, 13 Minn. 106, and 14 Minn. 214, and Pratt v. Beaupre, 13 Minn. 187, to the effect that one who signs a contract, affixing the word "agent" to his signature, the contract not disclosing any other person as principal, is *prima facie* liable upon it, but he may relieve himself by proof that he acted for and intended to bind another, for whom he was agent, and that when the contract was executed it was so understood and intended between him and the other party, followed and applied. An agent entrusted with personal property to sell may give out to whom he offers it a reasonable opportunity to try the articles, and make a contract to take effect as a sale if it prove satisfactory. *Deering v. Thom*, S. C. Minn., May 9, 1882.

APPELLATE PRACTICE—WHAT CONSTITUTES ERROR.

1. Alleged improper rulings on evidence which do no harm are not error. 2. Alleged errors not brought to the attention of the inferior court can not be considered in this court. 3. The findings of the lower court on the facts are conclusive in this court. *Davis v. Fredericks*, U. S. S. C., January 16, 1882.

CONTRACT—PROMISSORY NOTE—CONSIDERATION—TENDER.

Where the defease to an action on a promissory note was, that it was given for agricultural implements which the payees of the note promised to send the maker within a certain time, but which were not sent nor ever intended to be sent, and that the note was obtained without consideration and by fraud; and it was shown that a small portion of the articles were sent to the defendant and taken by him before the commencement of the suit: *Held*, that the verdict, which was for the defendant, should have been against him for some amount. In such a case the defendant can not be permitted to say that he took the articles sent as a trespasser. When a tender is made for the purpose of fulfilling a contract in part, the party to whom the tender is made can not, without consent, take and hold the article tendered for any other purpose, and he would be estopped from denying the true character of the transaction. *Burrill v. Parsons*, S. C. Me., March 16, 1882.

CORPORATION—LIABLE FOR MALICIOUS PROSECUTION.

An action for malicious prosecution lies against a corporation. Copley v. Machine Co., 2 Woods, 494; Record v. Railroad, 15 Nev. 167; Vance v. Railroad, 32 N. J. L. 534; Williams v. Ins. Co., 57 Miss. 759; Carter v. Machine Co., 51 Md. 290; Fenton v. Ma chine Co., 9 Phil. 189. The case of Gillett v. Mo. Valley R. Co. overruled. *Boogher v. Life Association of America*, S. C. Mo., May, 1882.

COUNTER-CLAIM—DAMAGES — MALICIOUS ATTACHMENT.

In an action for the price of goods sold and delivered, a cause of action independent against plaintiff for maliciously, and without reasonable or probable cause, commencing an action for such price before it became due by the terms of the contract of sale, and in such action causing an attachment of defendant's property, is not a counter-claim. *Schmidt v. Beckenbah*, S. C. Minn., May 9, 1882.

CRIMINAL LAW—EVIDENCE—RAPE.

On the trial of an indictment for rape, a medical witness who had examined the prosecutrix and found her sexual organs much inflamed, was allowed to give an opinion that such inflammation was produced by sexual connection by a violent—not a free connection. *Held*, error. *Noonan v. State*, S. C. Wis., May 10, 1882.

CRIMINAL LAW—EVIDENCE—PRESUMPTION.

No presumption arises against a defendant in a criminal case from his failure to call his accomplice as a witness. *State v. Cousins*, S. C. Iowa, April 22, 1882.

DAMAGES—MALICIOUS PROSECUTION—MALUS ANIMUS.

Malice is of two kinds: malice in law and malice in fact; the latter, *malus animus*, directing the party from improper motives to do a wrong intentionally, and the jury have a right to assess damages by way of punishment on a defendant for a wanton and reckless use of criminal process for the purpose of intimidation or to compel the payment of money, or the restoration of property alleged to have been stolen. *Orr v. Seiler*, S. C. Pa., November 14, 1881.

DAMAGES—REMOTENESS.

In an action for malicious prosecution, a claim for damages because, by the finding of the indictment, the wife of the plaintiff became sick, nervous, insane and utterly helpless, is too remote, and a demurrer thereto was properly sustained. *Hampton v. John*, S. C. Iowa, April 22, 1882.

EVIDENCE—EXAMINATION OF WITNESSES—CROSS-EXAMINATION.

Defendants have the right to cross-question each witness as to what he may have testified to on the stand, but he can not go beyond this; so he can not examine the witness in relation to items in an account about which he did not testify on the stand. *Lyman v. Betchell*, S. C. Iowa, April 21, 1882.

EVIDENCE—JUDICIAL NOTICE—PRESUMPTION.

Courts and juries from their general information may take the initials C. O. D., when affixed to packages sent by common carriers from seller to buyer, to mean, that a delivery is to be made upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods. *State v. Intoxicating Liquors*, S. C. Me., March 16, 1882.

EVIDENCE—LAPSE OF TIME—PRESUMPTION OF PAYMENT.

A debt which has been due and unclaimed and without recognition for twenty years, in the absence of explanatory evidence, is presumed to have been paid. The burden of proof is on the creditor to show that payment of the debt has not been made. Evidence that during this period the debtor had said to a stranger that he would not pay the debt, because the creditor was rich enough without it, is insufficient to overcome the presumption of payment. *Bentley's Appeal*, S. C. Pa., April 29, 1882.

EQUITY—MISTAKE IN FACT—RELIEF.

Where a bidder at an execution sale was induced by the sheriff to purchase the land offered for sale at a sum sufficient to satisfy the judgment and pay off a mortgage lien on the land, and the sheriff, by way of inducement, told the bidder that he would apply all the surplus of the purchase money, beyond what was necessary to satisfy the judgment, to the payment of such mortgage lien, when, in fact, he had no authority to do so, it was a mistake of fact from which equity will grant relief. *Bay v. Harnett*, S. C. Iowa, April 24, 1882.

FIXTURES—AS AFFECTED BY MORTGAGE.

Fixtures actually or constructively annexed to the realty, after the execution of a mortgage of the real estate become a part of the mortgage security, and, while the mortgage is in force can not be removed or otherwise disposed of by the mortgagor or by one claiming under him, without the consent of the mortgagee. *Wight v. Gray*, S. C. Me., April 4, 1882.

FRAUDULENT CONVEYANCES—OUTSTANDING JUDGMENTS—INTENT OF VENDEE.

Where a party conveys his property to a third party when judgments are outstanding against him, such conveyance is fraudulent; and a fraudulent intent upon the part of the purchaser need not be established to defeat the sale. Where a vendor conveys property with intent to defraud his creditors, and such fraudulent intent is participated in by the purchaser, his title will not be protected, notwithstanding he paid a sufficient consideration. *Williamson v. Wachenheim*, S. C. Iowa, April 22, 1882.

HUSBAND AND WIFE—CONFLICT OF LAWS—LIMITATIONS.

While a husband and wife were domiciled in this State the wife inherited property from her father in Norway, which, in the form of money, was transmitted to this country. *Held*, that the rights of the husband and wife in respect to such property are determined by the laws of this State, and not by those of Norway. More than six years after the husband had, with the knowledge of the wife, received such money, she commenced action against him for an accounting and for the recovery of the money. It appeared that the husband had kept, and at all times treated and claimed, the property as his own. No other facts being shown by the plaintiff to avoid the statute of limitations a recovery was correctly denied. A recovery by the wife of other money received by the husband less than six years before action brought, sustained. *Muns v. Muns*, S. C. Iowa, May 5, 1882.

HUSBAND AND WIFE—SEPARATE ESTATE—FRAUDULENT CONVEYANCE.

An owner of a saw-mill conveys it to two parties. Afterwards the vendor of the saw-mill and one of the vendees build a flouring-mill. This vendee then sells his half of the flouring-mill to the other vendee of the saw-mill, who pays for it out of her separate estate. She brings a partition suit for division of the flouring-mill property against the other part owner, who had been the vendor of the saw-mill. He sets up as a defense that the sale of the saw-mill was a fraud on the creditors of the husband of the female vendee, of whom he himself was one, and attempts to subject her interest in the flouring-mill to his debt, as being the property of the husband: *Held*, that the question of fraud in the sale of the saw-mill was immaterial as far as regarded the purchase of the interest in the flouring-mill. *Davis v. Fredericks*, U. S. S. C., January 16, 1882.

INSURANCE, LIFE—WHAT AMOUNTS TO—MASONIC RELIEF ASSOCIATIONS.

The Kennebec Masonic Relief Association is a mutual life insurance company, notwithstanding the organization is benevolent and not speculative in its purposes. When an accepted applicant for membership pays his membership fee and promises in his written application to pay the further sum of one

dollar and ten cents whenever any other member dies, or forfeit his own claim to a benefit; and the by-laws provide that the association, within thirty days after satisfactory proof of his death, will pay to his "widow" as many dollars, not exceeding one thousand, as there are surviving members at the time of the death—a contract of life insurance is completed. *Held, also*, that the contract being in writing, and unambiguous, and being in terms payable to the widow, the legal widow was entitled to the benefit; and that no evidence *dehors* the written contract, was admissible to vary its construction and show that another woman with whom the deceased member went through the form of marriage, and cohabited for many of the last years of his life, was intended. *Bolton v. Bolton*, S. C. Me., April 7, 1882.

JUDGMENT — WHO MAY MAKE INVOKE AS IN HIS OWN FAVOR—PARTIES AND PRIVIES.

No party is entitled to take advantage of a former judgment or decree as decisive in his favor of a matter in controversy, unless he has been a party or privy thereto, and would have been prejudiced by it had the decision been otherwise. *Chandler's Appeal*, S. C. Pa., April 17, 1882.

MALICIOUS PROSECUTION—PLEADING — REQUISITE ALLEGATIONS.

In an action for damages for falsely and maliciously procuring plaintiff to be indicted for the crime of perjury, an averment in the petition which clearly and distinctly alleged the defendants maliciously and without probable cause procured the indictment to be found, sufficiently avers the want of probable cause. Where the indictment is attached to and made part of the petition, it has no greater effect than introducing it in evidence, and will not estop the plaintiff from averring the want of probable cause for the criminal prosecution. *Hampton v. John*, S. C. Iowa, April 22, 1882.

MALICIOUS PROSECUTION—PROBABLE CAUSE.

Where one accused of crime has been discharged by the examining magistrate, the burden of proving probable cause is thrown on the prosecutor, in an action against him for malicious prosecution. *Orr v. Seiler*, S. C. Pa., Nov. 14, 1881.

PARTNERSHIP—FIRM REAL ESTATE—RECORD TITLE IN ONE MEMBER.

The record title to certain real estate being in one member of a firm, the equitable title being in the firm, such member conveyed it as security for his individual debt—the firm being at the time the debt was contracted and the agreement to make the conveyance entered into in the actual, open possession of the property. *Held*, that the equitable title of the firm is paramount to that acquired by the grantee under such conveyance. *Bergeron v. Richardott*, S. C. Wis., May 10, 1882.

PARTNERSHIP — PAYMENT OF INDIVIDUAL DEBTS WITH ASSETS OF INSOLVENT FIRM — TRUSTEE PROCESS.

The funds of an insolvent firm, paid by one partner upon his private debt, without the consent of the co-partner, may be attached in the hands of the private creditor, by trustee process in behalf of a firm creditor, the private creditor knowing when he received the funds that they belonged to the firm. The principle applies, although the note upon which the payment is made, be the single partner's note with the co-partner's name thereon as surety; and although the money be collected by a draft given in the name of the firm to the order of an agent of the private creditor. *Johnson v. Hersey*, S. C. Me., March 30, 1882.

SPECIFIC PERFORMANCE — TIME AN ELEMENT OF THE CONTRACT.

A court of equity will decree specific performance of a contract for the sale of land, in which time is not the essence of the contract, if the vendor can make a good title at any time before the decree is pronounced, although he was unable to do so when the action was commenced. The same rule applies in an action to foreclose a land contract. *McKinney v. Jones*, S. C. Wis.

UNITED STATES— GOVERNMENT CLAIM—ACCEPTANCE OF ADJUSTMENT WITHOUT PROTEST.

An acceptance by a claimant, without objection, of the amount of an account with the government as adjusted by the government officer, is a waiver of all other items. *Murphy v. United States*, U. S. S. C., 2anuary 16, 188.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 49. [14 Cent. L. J. 377.] A sells to B his stock in trade and the good will of the business, and stipulates in writing with B never to engage in like business within twenty-five miles of Columbus. Afterwards B sells out to C, and assigns to him the aforesaid stipulation of A. Can C restrain A from engaging in like business? Is such a stipulation assignable? A. F. M.

Columbus, Ohio.

Answer. It seems to be the settled law that contracts in restraint of trade generally, are void; they are not so when limited in time, or are partial in their operation. 2 Ohio St. 519; 3 Ohio St. 274; 36 Ohio St. 517; 42 Ind. 15; 25 Ind. 112; 6 Ind. (Porter) 200; 16 Vt. 176; 32 Mich. 462; 58 Pa. St. 51; 7 Cow. 307; 8 Mass. 223; 3 Pick. 188; 7 Bing. 735; 7 T. R. 118; 1 Wins. 181. Such a beneficial contract may be assigned in equity, and courts will protect the rights of the assignee, acquired by such transfer. 36 Ohio St. 517; 6 Ind. (Porter) 200; 56 Pa. St. 194; 10 C. B. (70 E. C. L.) 241; 2 Zab. (N. J.) 196. The assignee, C, may enjoin A from engaging in a like business, within the distance prescribed by the contract. 36 Ohio St. 517; 6 Ind. (Porter) 200; 1 Parsons on Contracts, 476; 2 Barr. 298. That injunction is the proper remedy in such a case is well settled by a uniform current of authority. 3 Myl. & Cr. 338; L. R. 4 Ch. App. Cas. 654; 3 Beav. 883; 33 L. J. Ch. 294; 2 Barb. Ch. 101; Leak's Digest of Law of Contracts. H. C. C.

Youngstown, Ohio.

Query 52. [14 Cent. L. J. 399.] C was arrested on a complaint made before a justice of the peace, charged with drunkenness. On the trial of the case, the constitutionality of the law upon which the complaint and warrant were based, was called in question by counsel for defendant. The justice of the peace held the law to be constitutional, the defendant was tried and acquitted by a jury. Since the trial of C, and in a different case, the Su-

preme Court have held the said law under which C was arrested to be unconstitutional. Is the justice of the peace liable for false imprisonment? R. A. L.
Salina, Kan.

Answer. The arrest was probably made under sec. 19 of the "Prohibition Law," in which the penalty for intoxication is a fine of five dollars, or ten days' imprisonment in jail after conviction before a justic of the peace. This section was declared unconstitutional, for the reason that it conflicted with sec. 16, art. 2 of the Constitution, wherein it is provided that no bill shall contain more than one subject. The section expressly confers jurisdiction on justices of the peace, and the question raised by the defense was this "Is the law constitutional?" The question was properly raised before the justice, the same as any other question of law, and could not be decided before it was raised. Mayberry v. Kelly, 1 Kan. 125, requiring justices to pass on constitutionality of laws. The justice, as was his right, decided that, to the best of his knowledge, the law was constitutional. If he decided incorrectly, it was simply an error of judgment, and the Supreme Court (Clark v. Spicer, 6 Kan. 440) has decided that judicial officers are not liable for errors of judgment. See, also, Field on Damages, sec. 760, *et seq.* I think the justice of the peace is *not* liable for false imprisonment. G.
Beloit, Kan.

Query 54. [14 Cent. L. J. 399.] A, in 1780 or 1783, sold real estate in the City of Baltimore, Md., but his wife, B, did not sign the deed. Property is very valuable. Have the heirs of B any claim? Under what law was conveyance made, common law of England or statutory of Maryland? What recourse have heirs of B? W.
Vincennes, Ind.

Answer. It is not stated to whom the property belonged. If it belonged to A, as a matter of course B could only have her dower, or survivorship, and therefore nothing could descend to her heirs. If it belonged to B, A only conveyed his curtesy or life estate, and after his death, the heirs of B would be entitled to it. The Code of Maryland, 1860, art. 24, gives a form of conveying in fee simple, and declares it shall be sufficient, but the form of the conveyance in this State is immaterial. The remedy of the heirs of B, if the property belonged to her, and if they are not barred by limitations, would be by action of ejectment.
Cumberland, Md. D.

RECENT LEGAL LITERATURE.

ABBOTT'S TRIAL EVIDENCE. The Rules of Evidence applicable on the Trial of Civil Actions (including both Causes of Action and Defenses), at Common Law, in Equity and under the Codes of Procedure. By Austin Abbott. New York, 1882: Baker, Voorhis & Co.

This work and its great practical utility are well known to the legal profession, although it is only about two years since its first issue, and has been critically examined heretofore in these columns. 11 Cent. L. J. 100. The fact that this is the sixth impression, within the short period that has elapsed since its publication, is an excellent indication that its many good qualities are meeting with a hearty appreciation on the part of the profession.

THE STUDENT'S GUIDE to Williams on Real Property, Being a Complete Series of Questions and Answers thereon. By H. Wakeham Purkis, Esq. Philadelphia, 1882: T. & J. W. Johnson & Co.

THE STUDENT'S GUIDE to Williams on Personal Property, Being a Complete Series of Questions and Answers thereon. By H. Wakeham Purkis, Esq. Philadelphia, 1882: T. & J. W. Johnson & Co.

THE STUDENT'S GUIDE to Smith on Contracts, Being a Complete Series of Questions and Answers thereon. By H. Wakeham Purkis, Esq. Philadelphia, 1882: T. & J. W. Johnson & Co.

The scope and plan of these little volumes, which are of about 100 pages each, are sufficiently indicated in the title page. Their field of utility is, of course, confined to students, and, even among them, we fancy it must be extremely limited. We are inclined to look with suspicion and doubt on any of the modern appliances, which have, of late years, come into vogue among students, and are intended to shorten the labor of the law student in carefully and thoroughly reading and mastering the elementary writers, in the various departments of the profession. We think that the student who bases his hopes of progress upon laborious days and nights spent with the time-honored instructors in his craft, Blackstone, Kent, Washburn, Story and Chitty, will reach more satisfactory results than he who attempts, by any sort of methods, to save this labor. The curse of the profession is superficiality and it is encouraged by any method of second hand study of standard authors such as this is. Even for the purposes of reviewing work which has been already accomplished, we are confident that a re-perusal, or even partial re-perusal, no matter how perfunctory, will produce better results, provided the work has been thoroughly done in the first instance.

LEGAL EXTRACTS.

INSANITY AND CRIME.

Public attention is at the present day continually drawn to the subject of insanity, as bearing on the administration of our criminal law, and each occasion serves only to show more clearly the hopeless conflict of opinion which prevails. Whether or not a scientific boundary between sanity and insanity be feasible, it seems at any rate possible to draw a line of demarcation between acts for which a criminal should be, and those for which he should not be, held responsible. Such at least is the conclusion to be drawn from an able article on "Insanity and Crime,"

which appeared in the *Times* a few days ago. The writer, who apparently speaks with the weight of considerable experience, first dispels the popular notion that a lunatic is a man who can neither reason nor behave himself, who is tormented by continual impulses to do wrong, and who may commit the most heinous crimes without any consciousness of their enormity—a notion which is sufficiently refuted by the liberty accorded to the large majority of inmates in every asylum, and the confidence placed in them without any evil results. The erroneous character of the idea has moreover been authoritatively recognized by foreign physicians, and the doctrine now accepted by French medical jurists is that, before a lunatic can be declared irresponsible for a crime, it must be ascertained whether the symptoms of his malady predisposed him to the perpetration of that particular offense. Such facts as these hardly bear out the view that a man who has once been under restraint himself, or whose parents have been so, should necessarily be acquitted of responsibility when he commits a murder. Homicidal maniacs the writer classes under three heads: First, the epileptic who is troubled with delusions, and, fancying himself surrounded by enemies, kills or strikes in self-defense; next, the drunkard with delirium tremens; and thirdly, the man afflicted with a certain kind of melancholia, who suffers from delusions of various kinds, and imagines the existence of continual attempts to injure him. Two features, we are further told, specially mark the crime of the genuine lunatic; its impulsiveness and the utter inadequacy of the motive for which it was perpetrated. "Where a man is found committing a crime planned with cool craft and dissimulation, and from which a substantial advantage is derivable, he can not be called a real madman. He may be a fool who has made a bad use of his reason, but in this respect he differs nothing from ordinary criminals. All crime is folly; but no crime, however monstrous and foolish, can or ought to be taken by itself as a proof of insanity." In these remarks seems to lie the gist of the whole matter, and the lesson to be learnt from them may well be taken to heart at the present day. It may be doubted, however, whether general credence will be given to the assertion that "the mental disorders which render a man unfit to discern between right and wrong are as plain to recognize as small-pox and scarlet fever." It is certainly scarcely borne out by the scientific evidence given at recent trials, or by the opinions generally expressed in connection with them; but, if true, it affords some hope that an accurate legal definition of insanity may be found practicable.—*Law Times.*

NOTES.

——A precedent for some of the legal difficulties in the path of the Channel Tunnel may be found in the bridge below the Niagara Falls, which is half in British, half in American territory. The bridge belongs to two companies, one having an American and the other a Canadian charter, each having power to amalgamate with the other. An information was filed by the Attorney-General of Ontario to establish the right of the public to pass over the bridge; but the Court of Appeal in that province declined to interfere, on the ground that at most it could only usher the passenger halfway across, which would not help him. Similarly, suppose, for reasons of their own, the Channel Companies were to carry Frenchmen at a lower rate than Englishmen from London to Paris, an Englishman, even with an order of the railway commissioners at his back, might find himself uncomfortably deposited halfway under the sea. The necessities of the tunnel, if made, require the careful use of all the securities in the power of international and municipal law, including Acts of Parliament and treaties.—*Law Journal.*

——Shiel, in his inimitable sketches of the Irish bar, tells of the verdict of a Clare jury in a case of "felonious gallantry." They acquitted the prisoner of the capital charge, but found him guilty of "a great undecency." R. Shelton Mackenzie, in his notes to Shiel's text, says: "This is nothing to the verdict of a Welsh jury: 'Not guilty—but we recommend him not to do it again.'" Mackenzie also relates that an English jury, not very bright, having a prisoner before them charged with burglary, and being unwilling to convict him capitally, as no personal violence accompanied the robbery, gave the safe verdict: "Guilty of getting out of the window." He adds, that the most original was that of an Irish jury before whom a prisoner pleaded guilty, throwing himself on the mercy of the court. The verdict was: "Not guilty." The judge, in surprise, exclaimed: "Why, he has confessed his crime!" The foreman responded: "Ah, my lord, you do not know that fellow, but we do. He is the most notorious liar in the whole country, and no twelve men who know his character can believe a word that he says." And the jurors adhering to their verdict, the "liar" escaped.

——A litigant who had been unsuccessful before a general term of the Supreme Court demanded that his case should be appealed. "On what ground?" asked his lawyer. "On the ground that the court was drunk." "Drunk?" ejaculated the counsel. "Drunk," repeated the client. "Did'nt you tell me that was a full bench?"—*Brooklyn Eagle.*